INDEPENDENT COMMITTEE FOR THE SUPERVISION OF STANDARDS OF TELEPHONE INFORMATION SERVICES (ICSTIS)

ORAL HEARING

Before:

Mary Symes (Chairman)
Simon Armson
Mike Tully

IN THE MATTER OF
MBlox Limited (service provider)
Jamba! GmbH (information provider)

ADJUDICATION

---

1. The hearing took place on 7 November 2005. At the hearing the ICSTIS Secretariat ("the Secretariat") was represented by Mr Adam Lewis of Counsel, instructed by Messrs Bates, Wells & Braithwaite ("BWB"). MBlox Limited ("Mblox") and Jamba! GmbH ("Jamba") were represented by Mr William Hibbert and Mr Simon Popplewell of Counsel, instructed by Latham and Watkins ("LW").

2. Also in attendance were Ms Janet Newell, the case officer and witness for the Secretariat; Mr Selman Ansari of BWB and Ms Florence Arbuthnott of BWB; Mr Omar Shah and Ms Rahman of LW; Mr Eric Young, General Counsel, Mr Oscar Verner, the Vice-President, Sales, Mr Adrian Sarowsi, Head of Marketing from MBlox; and, Mr Marcus Berger-de-Leon, Chief Executive Officer and Mr Robert Swift, Marketing Manager from Jamba.

3. Following the hearing on 7 November, both parties made further submissions in writing with regard to the complaints at JN2. The Panel considered its decision after receipt of these.

BACKGROUND

4. By a letter dated 11 May 2005 following the receipt of consumer complaints by ICSTIS, the Secretariat wrote to MBlox requesting information under paragraph 7.2.3 of ICSTIS 10th Code of Practice ("the Code") in respect of a reverse billed SMS subscription service (JN5). The service allowed consumers to download mobile ringtones and logos including the "Crazy Frog", "Sweety the Chick", "Nessie the Dragon" and "Dancing Teddy" by texting to a shortcode 88888 ("the service"). The Secretariat received a detailed response to the letter from Jamba, who stated that they operated this service under a contract by which MBlox provided "connection aggregation services" (JN6).

5. On 22nd June 2005 following further investigation, the Secretariat wrote to MBlox ("the Breach Letter") alleging breaches of paragraphs 4.3.1(a), 4.3.1(b) and 4.4.2 of the Code in relation to the promotion of the service. The breach letter also asked for information under paragraph 7.2.3 of the Code. There was no dispute between the parties that all information requested had been supplied.

6. By a letter dated 8th July 2005 Messrs Latham & Watkins ("LW"), solicitors acting for Jamba, stated that MBlox had passed the breach letter to them and put in a detailed response to the Breach Letter (JN8). By an e-mail dated 10th August 2005 LW confirmed to BWB that they:

   (1) acted for both MBlox and Jamba; and

   (2) formally requested an oral hearing pursuant to paragraph 7.8.1 of the Code ("JN1").

THE HEARING: PRELIMINARY ISSUES

7. Mr Hibbert, on behalf of MBlox and Jamba, stated that they wished to raise some preliminary issues, the first of which, if accepted, would drastically reduce the length of the hearing; namely they contended that MBlox was not a service provider for the purposes of Part 4 of the Code.

8. Mr Hibbert argued that Part 4 of the Code, which contained the breaches raised against it, did not apply to MBlox as Part 4 applied only to service providers, as defined in the Code, and that MBlox was not a service provider.

9. Mr Hibbert referred to the definition of service provider contained in paragraph 1.1.3 of the Code:

> *A 'service provider' is any person engaged in the provision of premium rate services who contracts with, or enters into arrangements with, a network operator for facilities enabling the provision of premium rate services or who contracts or enters into arrangements with any person who does not fall within*

section 120(9) of the Act who has himself contracted with or entered into arrangements with a network operator for such facilities.

Where a network operator itself provides premium rate services other than as a network operator, the network operator or such part of its organisation responsible for the provision of the same will be treated as a service provider for the purposes of this Code

10. Mr Hibbert contended that the effect of the second paragraph was that where a network operator provided premium rate services *as a network operator*, it is not to be treated as a service provider even though it would otherwise fall within the definition of the first paragraph of 1.1.3.

11. Mr Hibbert then referred to paragraph 1.1.2 of the Code, which defines "network operator" as including a person who is a provider of premium rate services within the meaning of section 120(11) of the Communications Act 2003 ("the Act"), which states:

> *A person falls within this subsection if:-*
> *(a) he is the provider of an electronic communications network used for the provision of the relevant service; and*
> *(b) an agreement relating to the use of the network for the provision of that service subsists between the provider or the network and a person who is a provider of the relevant service falling within subsection (9)(a) to (d).*

12. Mr Hibbert contended that Mblox was the provider of an electronic communications network (as defined in section 32 of the Act) to Jamba, satisfying section 120(11)(a).

13. In relation to section 120(11)(b), Mr Hibbert contended that an agreement existed between MBlox, the provider of the network, and Jamba, who was the provider of the relevant service, and that that 'relevant service' fell within section 120(9)(a) to (d), and that Jamba actually exercised each of the functions set out in subsections 9(a) to 9(d).

14. Accordingly Mr Hibbert submitted that as MBlox provided an electronic communications network and had an agreement with Jamba for the use of their

network in order to provide content to Jamba's customers, MBlox fulfilled the definition in section 120(11), and therefore was a network operator for the purposes of the Code.

15. Thus it was contended that MBlox should be treated as a service provider under the Code only if it provided premium rate services *other than as a network operator*, referring to the second paragraph of the definition of 'service provider' in paragraph 1.1.3 of the Code. MBlox believed that the effect of paragraph 1.1.3 was that where a network operator provided premium rate services *as a network operator*, it is not to be treated as a service provider even though it would otherwise fall within the definition of the first paragraph of 1.1.3.

16. In support Mr Hibbert stated that MBlox could give evidence that it had no dealings with Jamba or other service providers other than as a network operator and that it had no involvement with mobile content other than in its role as network operator.

17. Mr Hibbert assured the panel that MBlox were not trying to "escape responsibility" but in response to questioning acceded that it had never raised this issue before in its dealings with ICSTIS and had not undertaken any of the responsibilities of a network operator required under the Code.

18. Mr Lewis, on behalf of ICSTIS, referred the Panel to the contractual relationship that exists between MBlox and Jamba and in particular to the statement of Mr Werner at paragraph 9 which was before the Panel. He also asked the Panel to note that the contract was not available to the Panel and asked the Panel to draw such inference as necessary from this fact.

19. Mr Lewis in particular referred to the fact that the owner of the shortcode 88888 was MBlox and this was the basis on which ICSTIS, as regulator, identified

MBlox as the service provider, based on information provided by networks to ICSTIS.

20. Mr Lewis referred the Panel to paragraph 20 of the determination in the case of Opera Telecom Limited dated 1 November 2005 which was heard by the Independent Appeal Body of ICSTIS (JN10).

> *"We find it difficult to accept the proposition that any company could reach an agreement with a network operator, which necessarily had the appropriate licence and the electronic facilities; and then sell those facilities on by becoming itself another network operator. Theoretically if that was possible, one could end up with a very long chain before the purported service was provided."*

21. He further referred the Panel to paragraph 21 of that same determination, and in particular the appeal body reference to the principle that

> *"The effective regulation in the sector is premised on the ready identification of the service provider…"*

22. Mr Hibbert in reply suggested that the Opera case had been heard under the 9th Code of Practice and therefore was not applicable to the present case, which arose under the 10th Code.

Decision on the Preliminary Issue

23. The Panel considered section 120(11) of the Act (defining 'network operator', as referred to in paragraph 1.1.2(a) of the Code) and in particular the reference to being a provider of an "electronic communications network".

24. Section 32(1) provides that:

> *In this Act "electronic communications network" means:-*
> *(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description, and*
> *(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of signals –*

(i) apparatus comprised in the system;
(ii) apparatus used for the switching or routing of the signals; and
(iii) software and stored data.

[emphasis added]

25. Section 32(8) provides an inclusive definition of "conveyance of signals" providing that:

> *In this section references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.*
>
> [emphasis added]

26. On the face of it, section 32 would appear to apply to most service providers operating either a landline or a mobile service. In fact, one interpretation could be that it could even cover any sophisticated office switchboard.

27. The Panel finds that the key element in the definition of network operator is the fact that the electronic communications network is a transmission system for the conveyance of signals *for general reception* (emphasis added), notwithstanding the fact that section 32(8) is an inclusive definition. The Panel believes that a characteristic of conveyance of signals is that any such conveyance has to be for general reception.

28. Accordingly, given that an essential characteristic of a provider of an electronic communications network is that that party's network conveys signals 'for general reception', one has to then see whether this characteristic is present in MBlox's network.

29. MBlox, by its own admission, could not convey signals for general reception without an agreement with one or more of the mobile telephone carriers. In fact MBlox would have to have in place not only an agreement with a mobile carrier, but also a functional operation agreement to allow the product to be received and paid for by consumers.

30. Turning to the question of whether MBlox falls within the definition of service provider contained in the Code, one has to look first at paragraph 1.1.3 of the Code, which provides that:

> *A 'service provider' is any person engaged in the provision of premium rate services who contracts with, or enters into arrangements with, a network operator for facilities enabling the provision of premium rate services or who contracts or enters into arrangements with any person who does not fall within section 120(9) of the Act who has himself contracted with or entered into arrangements with a network operator for such facilities.*
>
> *Where a network operator itself provides premium rate services other than as a network operator, the network operator or such part of its organisation responsible for the provision of the same will be treated as a service provider for the purposes of this Code*

31. Section 120(9) provides that:

> *For the purposes of this Chapter a person provides a premium rate service ("the relevant service") if –*
>
> *(a) he provides the contents of the relevant service;*
> *(b) he exercises editorial control over the contents of the relevant service;*
> *(c) he is a person who packages together the contents of the relevant service for the purpose of facilitating its provision;*
> *(d) he makes available a facility comprised in the relevant service; or*
> *(e) he falls within subsection (10), (11) or (12).*

32. It is not in dispute that MBlox transacts premium rate services and provides them through its physical connection to the five mobile network operators, who in turn make connections to their customers. In order for this to take place one has to contract with or have an arrangement with a network operator for facilities enabling the provision of premium rate services.

33. Accordingly, the Panel determines that MBlox is a service provider for the purposes of the Code by virtue of its falling within section 120(9)(d): namely that it makes available a facility comprised in the relevant service which is a facility for making payment for the relevant services.

34. In any event, even if the Panel were wrong about its construction of the Act, the Panel accepts and approves the principles set out in the *Opera Telecom* case, particularly those set out in paragraph 21 of that decision.

35. Whilst the Panel appreciate that the *Opera* decision was one that was made in relation to provisions of the 9th Edition of the ICSTIS Code of Practice (as opposed to the 10th which is currently applicable and applicable in the present case), the fact that there was no statutory definition of network operator referred to in the 9th Code (which had its own definition) unlike the 10th Code, did not, in the Panel's opinion, detract from the force of the submission accepted and approved in the *Opera* decision.

36. The Panel accept that MBlox is in effect an aggregator by providing the technical system and billing facilities for customers who, via their mobile network carriers, have sent by SMS the requisite shortcode from their handsets. MBlox is not the information provider of the Service, the information provider is Jamba. The fact remains that for the purposes of effective regulation and enforcement, MBlox is regarded as the service provider, as MBlox is the party that contracts with the real mobile network operator.

37. The Panel also notes that MBlox has clearly regarded itself as a service provider from the outset of its dealings with ICSTIS and there was never any suggestion to the contrary until this case was brought.

38. The panel finds that MBlox does not fall within the definition of a network operator under the Code.

39. The Panel rejects the other arguments made as to MBlox's responsibility in relation to promotions as the provisions of paragraph 3.1.1 of the Code are clear: service providers are responsible for ensuring that the content and promotion of

all their premium rate services (whether produced by the service provider or by information providers) comply with the relevant provisions of the Code.

THE HEARING: SUBSTANTIVE ISSUES

Preliminary matter

40. The Secretariat, in the course of the hearing and in its skeleton argument, made various references to a broadcast advertising adjudication by the Advertising Standards Authority ("ASA"), dated 21st September 2005, against Jamba in which breaches of the CAP (Broadcast) TV Advertising Standards Code and Rules on the Scheduling of Advertisements were upheld ("JN9"). The Panel indicated to the parties that the ruling related to breaches of the ASA Code and not the alleged breaches that were the subject of this hearing. Accordingly, whilst the Panel did have available to it a copy of the ASA adjudication of 21st September 2005, no reliance was placed upon it by the Panel.

The Evidence

Print and Television promotions

41. The Panel had before it two print promotions at JN4 in the Bundle. One was a four-page pamphlet which had been inserted into 'Heat' Magazine for the week commencing 20th June 2005, the second was a full-page advertisement from the Daily Star dated 27th April 2005. It also had at JN4 and JN6, two DVDs on which were recorded television advertisements for Crazy Frog, Sweety the Chick and Friends. There was no dispute that these were the promotions for the service but it was the interpretation of the advertisements that formed the basis of the case for the Secretariat.

42. The Panel was taken in detail through the 'Heat' print promotion. The Panel also examined the Daily Star print promotion. In relation to the television promotion the panel was taken through the DVD supplied by the Secretariat.

43. Ms Janet Newell gave evidence on behalf of the Secretariat on which she was cross-examined.

44. Mr Werner and Mr Berger de Leon gave evidence on behalf of MBlox and its information provider Jamba.

Radio promotions

45. Whilst recordings of the radio promotions were supplied these were not raised in the initial breach letter from the Secretariat and accordingly were not dealt with by the Panel.

The Breaches

Paragraph 4.3.1(a)

46. Paragraph 4.3.1(a) provides:

> *Services and promotional material must not:*
> *(a) mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise,*

The print promotion

47. It was alleged by the Secretariat that the print promotion was likely to mislead a significant number of consumers by ambiguity and/or omission contrary to paragraph 4.3.1(a) of the Code in that it was not sufficiently clear that by texting a keyword the consumer was agreeing to buy a subscription service rather than simply the particular ringtone identified through the keyword.

48. It was said that nowhere in the promotional material was there a clear statement that the only way to purchase a particular ringtone was by joining a club and that nothing in the references to joining a club (whether in the top right-hand corner of the print promotion or in the terms and conditions) themselves suggested that joining a club was the *only* manner in which a consumer could purchase a particular ringtone. The Secretariat contended that it was not made sufficiently clear what the 'club' was and, more particularly, what it entailed, namely a subscription service. The Secretariat also took issue with the fact that the reference to the cost of 30p did not make clear that this was the average charge for a ringtone in the most cost-effective subscription service and that it

was not clear that a consumer could not purchase a single ringtone for as little as 30p.

49. The Secretariat also stated that the print promotion contained lists of many ringtones, which amounted to an invitation to a consumer to search through the list to find a particular ringtone, and that the instruction "to order Realtones and more, i.e. Crazy Frog – Axel F, simply txt to this number 88888 and choose much more from your club" did not clearly state that the consumer could not acquire a single ringtone. The Secretariat contended that the references to "more" are phrased in terms of the consumer having the additional or alternative option of "ordering" or "choosing" something else, as well as or instead of the single ringtone for the keyword that has been sent by text.

50. The Secretariat stated that there were no references to the terms and conditions in the section of the promotion informing the consumer how to order. It was accepted that there were small-print references on pages one and three but these were not sufficient. The terms and conditions did state that if someone joined a club they would have credits and would be able to select products with those credits, but there was nothing in the references to the terms and conditions in the top right-hand corners of the promotion or in the terms and conditions themselves to suggest that joining a club was the *only* way to purchase a ringtone.

51. In response to the complaint that the use of the word 'club' was not in itself sufficient to denote a subscription based service, MBlox argued that:

(1) the advertisements had to be looked at as a whole: the 'club' concept was entirely consistent with a recurring payment; the advertisements contained clear references to the recurring cost of the service; and the use of the word 'unsubscribe' when describing the stop command implied a subscription arrangement. Accordingly MBlox stated that the use of the word 'club' in fact reinforced the concept of recurring payment;

(2) the use of the word 'club' could not be said to be misleading as the service that a consumer would join could accurately be described as a club;

(3) the use of the word 'club' complies with the Mobile Entertainment Forum code of practice and is accepted by network operators and has been approved by CAP.

52. MBlox also argued in relation to the alleged breach of paragraph 4.3.1(a) that

(1) the qualification to the price statement "from as low as 30p" was readily apparent both from the prominent asterisk and also from the statement "see terms and conditions on page 3" and that an average consumer would understand that the pricing information was subject to terms and conditions and that those terms and conditions make clear that the cost of membership to each club was £3 per week;

(2) the fact that bulk items had been broken down into individual components as a marketing tool was common practice and therefore could not be considered misleading. Reference was made here to exhibits MB4 to MB6 to Mr Berger-Leon's witness statement, containing various sample advertisements which MBlox argued supported this contention (including, for example an advertisement for a subscription for Sky Television);

(3) the fact that the word "unsubscribe" was used reinforced the fact that this was a subscription-based service;

(4) the terms and conditions fully explained the nature of the services in that customers had to elect which of the clubs they were joining;

(5) a reasonable customer reading the advertisement would understand that they would have to pay for each ringtone and that, in the absence of individual prices next to each individually listed ringtone, the customer would follow the direction given in the advertisement to the terms and conditions regarding the cost.

53. MBlox stated in its additional written responses that the print advertisements had already been amended such that the concerns of ICSTIS had been allayed. MBlox stated, however, that this was not an admission that there had been a breach of the Code, but was simply a reflection of the ongoing commitment to updating practices in line with suggestions, comments and code amendments by regulators and network operators, and also to ensure that all customers are happy with product they receive.

The television promotion

54. The Secretariat's case in relation to the television promotion was that, just as with the print promotion, the consumer was being asked to choose from three formats of ringtone being advertised and that the advertisement as a whole was based on the particular ringtone being played and visually represented. They referred to the voiceover of the advertisements which exhorted the consumer to purchase the appropriate format of ringtone by texting the relevant keyword to 88888. The voiceover started and ended with references to the consumer purchasing a particular ringtone.

55. So far as the references to "getting more in the Jamster clubs" and to joining "the Jamster club for more fun" are concerned, the Secretariat contended that these were phrased in terms of the consumer having the additional or alternative option of doing something else as well as or instead of purchasing the single ringtone.

56. The Secretariat suggested that the top strap to "Jamster Clubs" together with the crawling text were wholly insufficient to disabuse the consumer of the impression that he/she can purchase a single ringtone by texting the appropriate code to 88888. This information was insufficiently prominent to draw the consumer away from the substance of the advertisement, and that in any event all it did was raise the possibility of joining a Jamster club, as opposed to joining a subscription service under which the consumer would be regularly billed by

reverse SMS. The arguments set out in relation to the print promotion were repeated in relation to the use of the word 'club'.

57. MBlox repeated its arguments set out above in relation to the print promotion and also stated that:

(1) the phrases quoted by the Secretariat had to be taken in the context of the advertisements as a whole and that accordingly it was not misleading;

(2) the phrase "normal operator charges apply" was not misleading and was an appropriate statement to include (keeping in mind Guideline No 20 to the Code) and that as a matter of fact normal operator charges did apply each time a request for a ringtone or logo is made by a consumer in addition to the cost of the service (which cost was clearly stated in the crawling text).

The test to be applied under paragraph 4.3.1(a)

58. There was considerable debate between the parties over what test had to be applied under this paragraph. The case put forward by MBlox was that the test was an objective one and relied on the case of *Gut Springenheide GmbH and Tusky v Oberkreisdirekton des Kreises Steinfurt* Case C-210/96, in which the European Court of Justice stated that when assessing the misleading effect of a statement designed to promote sales, national courts should take into account the "presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect."

59. However, this case was decided by reference to EC legislation and not by reference to the provisions of the Code and therefore it is of limited assistance to the Panel. MBlox also relied upon the case of *OFT v Officers Club* which, as applied to provisions relevant to that case, decided that the appropriate test was based on the "ordinary reasonable consumer". Once again, this case does not address the issue of the appropriate test to apply in the present case.

60. However, in the course of the hearing it became apparent to the Panel that in fact there was not much difference between the parties as to the test to apply. The Panel does not think that there has to be significant majority of persons that may be deceived, but simply considers whether there has been a significant number of persons who may have been deceived, as opposed to the 'moron in a hurry' (as referred to by Mr Hibbert), who inevitably will be deceived. At the end of the day, the Panel believes that this is a matter for the Panel's own judgment based on its members' own experience.

61. The Panel finds that the test under paragraph 4.3.1(a) of the Code is one which relies on the ordinary meaning of the words: namely whether the Panel thinks that a significant number of people would be misled by the promotional material in question.

Paragraph 4.3.1(b) of the Code

62. Paragraph 4.3.1(b) provides that:

> *Services and promotional material must not:*
> …
> *(b) be such as to seek to take unfair advantage of any characteristic or circumstance which may make consumers vulnerable."*

63. The Secretariat contended that the words "seek to take unfair advantage" ought to be construed objectively and not subjectively because the focus of this provision was the likely effect on the consumer.

64. The Secretariat phrased the question as being whether any aspect of the promotional material was such that an unfair advantage would be obtained as a result of the circumstance that a significant number of consumers (including children, even if they were not specifically targeted) wanted to purchase the highly popular Crazy Frog and Sweety the Chick ringtone.

65. MBlox drew the Panel's attention to a large amount of research that had been done to show that children were not the principal users of this service.

MBlox argued that the test that should be applied was subjective, i.e. that the service provider had sought to take advantage.

Breach of paragraph 4.4.2

66. Paragraph 4.4.2 of the Code provides that:

> *Textual pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination*

67. ICSTIS Guideline No 1 provides that:

> *Below are a number of examples of what the Committee recommends in terms of compliance with paragraph 4.4.2 of the Code (please note that this is not a complete list and is subject to change):*
> *…*
> o *Pricing information stated in the terms and conditions*
> *Pricing information which is contained as part of the terms and conditions of a service, promotion or product rather than as 'stand-alone' information is unlikely to be acceptable to the Committee…*

68. The Secretariat contended that the words here had to be given their ordinary meaning so that the question was: is the pricing information in each of the print promotions and the television promotions easily legible, sufficiently prominent and presented in a way which did not require the consumer to examine it closely?

69. The Secretariat's case was that the textual pricing information was insufficiently legible, insufficiently prominent, required close examination (contrary to paragraph 4.4.2) and was not 'stand-alone' but contained in the terms and conditions (contrary to ICSTIS Guideline No 1). The following reasons were advanced:

(1) the only pricing information close to being accurate was contained either in the small print in the terms and conditions or in the crawling text;

(2) in neither place was it easily legible or prominent, specifically:

i. the terms and conditions were at the bottom of the page and contained in the middle of the text. They were not referred to in the instructions on how to order;

ii. the crawling text would not be noticed by most consumers, whose eyes would be drawn to the attractive moving character (Crazy Frog/ Sweety etc);

iii. the information was not readily understandable or easily digestible;

iv. to be easily legible or prominent in the circumstances of this case, the pricing information would have to have been larger in the print promotion, and possibly also be static in the television promotion.

70. In relation to the print promotion, MBlox relied upon its submissions made and set out in its skeleton arguments. Its case was that the nature and the cost of the service would readily be apparent to an average consumer and pricing information was sufficiently prominent to convey that message to the consumer.

71. In relation to the television promotion, MBlox contended that:

(1) prominence did not equate to "stand-alone", nor static and that ICSTIS was inviting interpretations that did not follow from the wording of the Code;

(2) the test of prominence was not whether the pricing information was the *most* prominent piece of information, but simply whether the pricing information was sufficiently prominent and that the crawling text on the television advertisement was clear, well sized, and moved at a reasonable speed notwithstanding the other moving images and sound.

THE DECISION

Complaint forms

72. In this case there was a large bundle of complaint forms produced and relied upon by ICSTIS. As stated earlier both parties made submissions after the hearing in relation to the complaint forms.

73. Complaints often trigger an investigation by ICSTIS but the regulator also carries out monitoring of services to ensure compliance. The Panel accepts and endorses the fact that ICSTIS can act of its own volition (see paragraph 7.7.2 of the Code) and without the need for a complaint from a consumer to instigate action under the Code. This principle was explicitly endorsed in the *Launchasset* decision of the IAB which states that ICSTIS does not require 'public outcry' in order to act (paragraph 34 of the determination).

74. In this case the Panel looked at the complaints to see their general tenor and took from them the fact that consumers were not clear about the subscription nature of the service. The complaints simply informed the Panel of the background and went to the seriousness of the breach. ICSTIS does not always receive **all** complaints about a particular service; some are made to ICSTIS, some to the network operators, some direct to service providers and information providers and some to the media (such as The Mail on Sunday).

75. The Panel noted from the complaints a theme that complainants thought that they were purchasing a single ringtone and that they did not realise that they were subscribing to a reverse-billed SMS service which would regularly send them chargeable text messages.

76. The Panel makes clear, however, that the nature and effect of the promotional material are matters for the Panel to consider and do not in any way depend on the number or extent of the complaints.

Paragraph 4.3.1(a)

The print promotion

77. As stated, it is for the Panel to form its own view on whether a significant number of people would be misled by the promotional material in question.

78. The Panel considered both the print promotion in 'Heat' Magazine and also the print promotion contained in the Daily Star.

79. In relation to the use of the word 'club', the Panel thinks that there is nothing wrong with the use of this word in itself, **but** the context in which it is used has to be carefully examined.

80. The Panel determines that the use of the word 'club' in the present context in this Service does not explain clearly to a consumer that in fact what is being promoted is a subscription service under which the consumer will be sent products or WAP links regularly and will be charged for the same by reverse-billed SMS. MBlox's argument that the use of the word 'club' is suggestive of a subscription arrangement is not accepted by the Panel as this is not good enough for consumers in the present case. A 'club' could involve a simple one-off payment or indeed no payment all.

81. The promotion contained a general exhortation to join in and created a sense of inclusiveness. It is not dissimilar to the advertisement once used for chocolate bars which used the term 'club' ("if you want a lot of chocolate on your biscuit join our club"). It was not clear to consumers that by texting a keyword they would be making a commitment to join a subscription-based service.

82. The Panel makes clear that it does not object to the use of the word 'club' per se, it is simply that its use in the present context is not of itself sufficiently descriptive of the type of service that is being promoted.

83. The terms and conditions in the print promotion contained the words 'join clubs', which amounts to an invitation or recommendation: it nowhere refers explicitly to the true nature of the service. The Panel finds this is a clear case where the wording used in the print promotion was misleading.

84. The Panel finds that the print promotion requires a lot of interpretation in order for the consumer to understand what is in fact being offered and that this requires application and patience from the consumer. The Panel also noted that at the time the breaches were raised the service was a relatively new concept and accordingly the Panel thinks that a higher duty of care should fall on the service provider (and through them the information provider) to explain in precise language what the service comprised.

85. It is obvious to the Panel that a great deal of thought and trouble went into producing the advertisements, for example, by using different keywords in each of the advertisements to ensure that sales could be properly traced. This is in contrast to what appears, on the evidence before the Panel, to be little time spent on the terms and conditions. Furthermore, given that the Service was, as has already been stated, a relatively new concept, one might have expected any promoter to seek free copy advice from the appropriate regulator, namely ICSTIS. The Panel finds that there was no attempt to explain to the consumer exactly what the service entailed, namely a continuing charge for products being provided under a subscription service, as opposed to purchasing a single ringtone.

86. The Panel finds that the terms and conditions are unclear and that there was a significant omission of explicit information concerning the Service. There was

evidence of consumers being confused about the service which the Panel accepts but, for the avoidance of doubt, the Panel finds that the advertisement is misleading based on the Panel's own interpretation of the same.

87. The fact that the service was amended by the time the written response to the complaint was received does not mean that a breach of the Code has not taken place and the Panel can act in respect of historical breaches.

88. Accordingly for the reasons set out above, the Panel determines that the print promotion was misleading and in breach of paragraph 4.3.1(a) of the Code.

The television promotion

89. The Panel's impression of the television advertisement (taking into account both the voice-over and the on-screen text) is that what is being sold is the particular tune being played in the advertisement. There is instant gratification by texting the keyword. Consumers will buy a tune without realising that they are committing to a subscription service.

90. As for the text crawling across the screen, the Panel has no issue with moving text of itself. The Panel does take issue with the fact that the key information, namely that the cost is £3 per week, should be present on screen – whether moving or not – for the duration of the advertisement, which it is not**.**

91. As for terms other than pricing, such as a the reference to clubs, the reasoning set out above in relation to the print promotion applies again here and accordingly important information is again missing.

92. Overall, therefore, the Panel finds that the television advertisements are misleading by omission in that key information is not readily accessible. There is no pricing information provided by the voiceover and at no point is it stated that the service is subscription-based. The fact that the pricing information is not

placed on the screen for the duration of the advertisement adds another facet in that the advertisement may not be seen by a consumer in its entirety and therefore it is essential to ensure that the most important information is present at all times during transmission. The Panel notes that, for example, the 88888 number remains on the screen permanently, enabling the consumer to access the service without necessarily having seen all the other information required to make an informed decision. In contrast to the experience with a print advertisement, a consumer cannot continue to view the promotion at leisure and therefore there is a higher duty to ensure that all the relevant information is available at all times.

93. Furthermore, the Panel finds that the use of the phrase "Normal operator charges" was misleading because in fact it meant nothing in isolation. It did not comprise a sentence and could have been construed as meaning that this was all that the service cost. The Panel places no emphasis on the fact that the words "Normal operator charges" remained on-screen for a slightly longer period. They were the last words of the crawling text but if they froze on occasion this was a matter under the control of the television network.

94. Accordingly, for the reasons set out above, the Panel finds that the television promotions breached paragraph 4.3.1(a) by being misleading.

Paragraph 4.3.1(b)

95. Whilst it is plain that children were not deliberately targeted, Jamba (and therefore MBlox) was indifferent in this respect as to the time and place where advertisements were scheduled, for example, they appeared on MTV and other channels which are popular with children. The Panel believes that the service would have been attractive to many children given the personae of the Crazy Frog, Sweety the Chick and Nessie the Dragon et al. However, those matters are within the remit of the ASA, which has dealt with them.

96. The Panel finds that for the purposes of paragraph 4.3.1(b) the test about whether a service provider has sought to take advantage is subjective. The fact that the Panel believes that the service would undoubtedly be attractive to children is not relevant for the purposes of assessing whether Jamba *sought* to take advantage of this.

97. The Panel accepts Jamba's evidence that it did not specifically set out to target children. On the television advertisements there was a "16+" on screen and the minimum age was stated clearly on the print promotion in the terms and conditions.

98. Accordingly, the Panel finds that there is no breach of paragraph 4.3.1(b) of the Code.

Paragraph 4.4.2

Print promotion

99. In relation to the print promotion, the Panel finds that the pricing information in the terms and conditions was insufficiently prominent in that it was contained eight lines down in the advertisement in 'Heat' Magazine and five lines down in the Daily Star advertisement.

100. For the reasons set out in paragraph 4.3.1(a), on looking at the print promotion it was not clear what the consumer had to do: an asterisk does not achieve sufficient prominence. The Panel believes that in order to make the pricing information sufficiently prominent there were a number of alternatives to confining the information to the fifth or eighth lines of the terms and conditions.

101. Effectively the consumer is being made to 'work' to find out the cost: something that plainly ought not be. The Panel determines that the print promotion requires

a consumer to give the promotion close examination to ascertain the pricing information.

102. Accordingly the Panel finds that the print promotion breached paragraph 4.4.2 of the Code.

Television promotion

103. For the avoidance of doubt, the Panel should make clear that it watched the DVDs with footage of advertisements supplied by the Secretariat and by Jamba.

104. The pricing information is not permanently on the screen and is not prominent. In addition no pricing information is contained in the voice-over script. The only pricing information is contained in the crawling text moving across the screen and it is only on the screen for a relatively short time when compared to the length of the advertisement as a whole.

105. The Panel is not against moving text containing pricing information per se but in the present case the pricing information appears only once and for a relatively short time. Furthermore, the crawling text ends with a statement that is misleading in relation to pricing, namely "Normal operator charges", which is patently not the same as £3 per week and accordingly it is not clear that the normal operator charges are *in addition* to the £3 per week. The Panel accepts that consumers do not attentively watch television advertisements and would not necessarily understand what charges apply.

106. Accordingly, for the reasons set out above, the Panel finds that there was a breach of paragraph 4.4.2 by the television advertising.

107. The Panel was taken by the Secretariat to a separate allegation of a breach of paragraph 4.4.2 in which the pricing information on some advertisements in the scrolling text stated that the price was "/week£3" as opposed to "£3/week". It

was accepted by Mr Hibbert that this had taken place and was a copy error which was corrected as soon as it was discovered. This remains, however, a further specific breach of the Code (though the Panel took into account the immediate correction as mitigation).

SANCTIONS

108. The breach of paragraph 4.3.1(a) of the Code was, in the opinion of the Panel, a serious one, regardless of the level of the complaints received.

109. The complaints do, in the opinion of the Panel, demonstrate that people did not understand what the Service entailed and what contract they were entering into, namely a regular subscription-based service reverse-billed by SMS. The level and nature of complaints can be taken into account when assessing the seriousness of the breach. The Panel notes the detailed objection to the complaints submitted by counsel for MBlox but the fact remains that the complaints have a common denominator, namely the 88888 shortcode supplied by MBlox and, as admitted by Jamba, exclusively used by it. Therefore whilst criticisms have been made on the presentation of the complaints, the fact remains that the Service being complained of was one with the 88888 shortcode, which necessarily can point only to the service.

110. In addition, the Panel finds that the breach of paragraph 4.4.2 was also a serious one for the reasons set out above.

111. In the present case the Service was part of a 'social and mass phenomenon' in relation to the Crazy Frog in particular, and in this regard Jamba, and through them MBlox, appeared to the Panel to have a careless disregard and unprofessional attitude to consumers in that it patently failed to make clear to them the nature of the service. However, for the avoidance of doubt, the Panel does not think that this was done maliciously or with fraudulent intent.

112. The Panel looked at the breach history of MBlox but found no relevant breaches where Jamba was also named as information provider.

113. In the present case the revenue figures supplied to the Panel indicated that this Service was hugely successful: the confidential information made available to the Panel relating to the amount of revenue generated clearly demonstrates that the service did indeed assume the character of a 'mass phenomenon'.

114. It is plain that Jamba changed consumer information in their advertisements only when challenged by regulators and not of its own volition. Therefore this is not a factor that weighs in its favour.

115. The Panel accepts that improvements have since been made to the advertisements and therefore finds that a bar is not an appropriate sanction in this case.

116. However, the Panel does find that a fine is appropriate. In relation to the amount of the fine the issue of revenue is an important factor to take into consideration. In this case the service was extremely successful and therefore MBlox has benefited from the breaches as service provider and Jamba as information provider.

117. Under the Code the responsibility for this service is clearly that of MBlox, the service provider, and it is no defence to state that the acts complained of were in fact the acts under the direct control of the information provider, Jamba.

118. The Panel was asked by the Secretariat to direct that Jamba be additionally liable for any sanction imposed against MBlox as it was said by the Secretariat that there was an agreement between them in relation to these breaches and given that they were commonly represented by LW. However, the Panel made clear at the outset that any sanctions would and could be imposed only against the

service provider, MBlox, as there was no ability under the Code to impose sanctions against an information provider.

119. Accordingly the Panel directs that the following sanctions be imposed on MBlox:

(1) A formal reprimand;
(2) A fine of £40,000;
(3) Payment of redress to any complainants on the ICSTIS database at the date of this adjudication;
(4) Payment all of ICSTIS' legal and administrative charges incurred in relation to this adjudication.

Further, for the avoidance of doubt, the Secretariat is to write to each complainant and to notify them of their right to redress as provided for above. MBlox will be required to cover the actual cost to the Secretariat in carrying out the notification exercise set out above as part of the administrative charges incurred in relation to this adjudication.

Mary Symes (Chairman)
Simon Armson
Mike Tully

19 December 2005